

Serial: D6/5/73
17 January 1973

Mr. Bruce B. Willson
Acting Assistant Attorney General
Antitrust Division
United States Department of Justice
Washington, D. C. 20530

Re: United States v. International Business Machines
Corporation, 69 Civ. 200, S.D. N.Y.

Dear Mr. Willson:

Your letter of 13 December 1972 to the Director, National Security Agency, forwarded an Order Supplementing Pretrial Order No. 2 which requires the Government to identify documents being withheld from production on the grounds of privilege.

Our opinion is that this supplemental order has no application to the National Security Agency. The United States by its motion dated April 27, 1972, requested the Court to defer the question of the Government's production of "national security" documents of NSA which would otherwise be produced pursuant to Pre-Trial Order No. 2. The Court at the hearing of this motion on May 10, 1972, deferred the production of national security documents of NSA until a later, unspecified, time when IBM's need for such documents in its defense could be more precisely identified. We are not aware of any modification to date of this order of the Court which has the effect of suspending indefinitely the requirement for the production of the uniquely sensitive documents of this Agency.

In the event the Court determines that the Supplementing Order does apply to the National Security Agency, there is inclosed an affidavit of the Director, NSA, which concludes that the identification of NSA documents being withheld from production would be prejudicial to the national security interests of the United States.

Sincerely,

/s/ Roy R. Banner

ROY R. BANNER
General Counsel

Incl:

a/s

UNITED STATES OF AMERICA,)
) Civil Action No. 69 Civ. 200
Plaintiff,)
v.) AFFIDAVIT
)
INTERNATIONAL BUSINESS) of
MACHINES CORPORATION,)
) Lt. General Samuel C. Phillips
Defendant)

STATE OF MARYLAND)
) SS
COUNTY OF ANNE ARUNDEL)

Lieutenant General Samuel C. Phillips, being duly sworn, deposes and says:

1. I am Lieutenant General Samuel C. Phillips, the Director of the National Security Agency since August of 1972.

2. This affidavit supplements the affidavit of Vice Admiral Noel A. M. Gayler, the former Director of the National Security Agency, dated 27 April 1972. Admiral Gayler's affidavit described the functions of the National Security Agency and the indispensable role of automatic data processing equipment in accomplishing the security and intelligence responsibilities of the Agency. His affidavit further cited the Federal statutes controlling access to and safeguarding of the sensitive cryptologic information of the National Security Agency. Admiral Gayler's affidavit concluded that the documents and information of the National Security Agency of the United States of the kinds described in Pre-Trial Orders #2 and #3 of this Court are uniquely privileged documents of the Executive Branch of the United States which can be used only for national security purposes, and cannot be disclosed for any other purpose.


3. The Order Supplementing Pre-Trial Order #2, dated 21 November 1972, requires a description of any documents being withheld from production on grounds of privilege. The National Security Agency has not produced any documents pursuant to a ruling of this Court of May 10, 1972 which

deferred the production of national security documents of NSA until a later time when the defendant's need for such documents in its defense could be more precisely identified. The NSA documents being withheld are surveys, analyses, and reports relating to the selection of specific computers and associated software routines. They describe the intelligence problems requiring the acquisition of automatic data processing equipment, and compare the ability of specific devices to perform the required cryptologic functions. These documents bear the highest authorized national security classifications and their dissemination is strictly limited and controlled within the National Security Agency and the Government to persons having a need-to-know for national security purposes. A description of these documents in the format required by the Supplementing Order would disclose the scope and nature of NSA's activities in the automatic data processing field and would identify the NSA personnel and organizations responsible for these operations. It could also reveal the U. S. and foreign organizations with which NSA collaborates in the conduct of intelligence and security matters.

4. The cryptologic activities of the Government are so sensitive that in addition to the criminal statute, 18 U.S. Code, section 798, prohibiting the prejudicial use of this particular kind of classified information, Congress has passed a statute to protect even the records, organization, and personnel structure of the National Security Agency, which is the principal cryptologic agency of the Government. Public Law 86-36 (50 U.S. Code 402, Note) provides that no law "shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof or of the names, titles, salaries, or numbers of the personnel employed by such agency." A third statute,

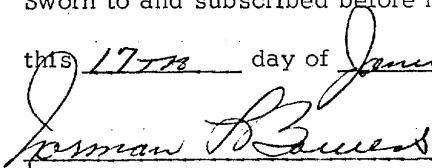
P.L. 88-290, 50 U. S. Code 831 ff. prescribes a comprehensive personnel security system and associated procedures to control the access to National Security Agency information by persons having a need-to-know for national security purposes. Finally, with specific reference to disclosure of documents concerning procurement of computers, the Committee on Government Operations of the House of Representatives said in its Report No. 802 in 1965 that it is of paramount importance that agencies with intelligence or security responsibilities maintain their security in line with appropriate Federal statutes and as the President might direct.

5. As Director of the National Security Agency, I am personally responsible for compliance with the aforementioned public laws and the orders of the President governing the physical protection of and the access to the classified information of this Agency. Within the meaning and intent of the statutes cited above, I have concluded that it would be prejudicial to the national security interest of the U. S. to describe and identify the documents of the National Security Agency of the kind described in paragraph 7 of the Order Supplementing Pre-Trial Order No. 2.


SAMUEL C. PHILLIPS, Lt General, USAF
Director, National Security Agency

Sworn to and subscribed before me

this 17th day of January, 1973.


NOTARY PUBLIC

My commission expires 1 July 1974.